

**RECEIVED
CENTRAL FAX CENTER**

Doc Code: AP.PRE.REQ


AUG 30 2007

PTO/SB/33 (07-05)

Approved for use through xx/xx/200x. OMB 0851-00xx

U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 101.0044-04000	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on _____ Signature _____ Typed or printed name _____		Application Number 09/605,001	Filed June 27, 2000
Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request. This request is being filed with a notice of appeal. The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.		First Named Inventor Gary Karlin Michelson	
		<table style="width:100%;"> <tr> <td style="width:50%;">Art Unit 3772</td> <td style="width:50%;">Examiner Michael A. Brown</td> </tr> </table>	
Art Unit 3772	Examiner Michael A. Brown		
<p>I am the</p> <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <input type="checkbox"/> applicant/inventor. <input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96) <input checked="" type="checkbox"/> attorney or agent of record. Registration number <u>34,383</u> <input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____ </div> <div style="width: 45%; text-align: center;">  Signature Thomas H. Martin Typed or printed name 330-877-0700 Telephone number August 30, 2007 Date </div> </div> <p>NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.</p>			
<input checked="" type="checkbox"/> *Total of <u>1</u> forms are submitted.			

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

**RECEIVED
CENTRAL FAX CENTER**

AUG 30 2007

**RESPONSE UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 3772**

PATENT
Attorney Docket No. 101.0044-04000
Customer No. 22882

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:)	Confirmation No.: 5171
Gary Karlin Michelson)	
Serial No.: 09/605,001)	Group Art Unit: 3772
Filed: June 27, 2000)	Examiner: Michael A. Brown
For: APPARATUS AND METHOD OF)	
INSERTING SPINAL IMPLANTS)	

Mail Stop AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

PRE-APPEAL BRIEF REQUEST FOR REVIEW

In reply to the Final Office Action of May 1, 2007, Applicant submits the following remarks for consideration by the Members of the pre-appeal brief conference.

I. Brief Background

The application includes ten (10) independent claims of which independent claims 108, 114, 117, 121, 122, 127, and 130 have been allowed. Independent claims 105, 120, and 125 stand rejected under 35 U.S.C. § 102(b). The rejection of independent claims 105, 120, and 125 under 35 U.S.C. § 102(b) is the subject of this Request for a Pre-Appeal Conference.

II. Clear Errors

(1) The Examiner's rejection of claims 105, 106, and 120 (of which claims 105 and 120 are independent) under 35 U.S.C. § 102(b) as being unpatentable over U.S. Patent No. 3,486,505 to Morrison ("Morrison"), is erroneous because:

Pre-appeal Brief Request for Review 8-30-07.doc

Application No. 09/605,001
Pre-Appeal Brief Request For Review dated August 30, 2007
Reply to Final Office Action of May 1, 2007

(a) independent claim 105 recites a method for performing a surgical procedure using a surgical retractor with two spaced apart retractor arms, each retractor arm having first and second supporting surfaces, where "the first supporting surface of each retractor arm engages one vertebrae and the second supporting surface of each retractor arm engages the other vertebrae";

(b) independent claim 120 recites a surgical retractor for use in distracting adjacent vertebrae having first and second retractor arms, where "each retractor arm [defines] a first vertebra supporting surface and a second vertebra supporting surface";

(b) as shown in Fig. 26, for example, Applicant discloses a surgical retractor (extended outer sleeve 700) including an elongate member (hollow tubular member 702) with two spaced apart retractor arms (extended portions 720 and 722), each retractor arm including first and second supporting surfaces, where, as shown in Fig. 27, the first supporting surface of each retractor arm engages one vertebrae and the second supporting surface of each retractor arm engages the other vertebrae;

(c) Morrison teaches an orthopedic surgical instrument B having a supporting frame 10 with arms 11 that are "mounted for movement toward and away from one another...each arm being provided with a tip 12 at its forward end, the tips being movable into proximate (close) relationship relative to one another (see Fig. 1) so that they may be inserted between closely adjacent vertebral bodies A" (Morrison column 2, lines 10-18);

(d) as shown in Fig. 2 of Morrison, however, each of the arms 11 (and their associated tip 12) only contacts one of the vertebral bodies A;

(e) accordingly, Morrison does not teach or suggest a surgical retractor with two spaced apart retractor arms, each retractor arm having first and second supporting surfaces, where the first supporting surface of each retractor arm engages one vertebrae and the second supporting surface of each retractor arm engages the other vertebrae, or teach or suggest a surgical retractor for use in distracting adjacent vertebrae with first and second retractor arms, where each retractor arm defines a first vertebra supporting surface and a second vertebra supporting surface;

Application No. 09/605,001
Pre-Appeal Brief Request For Review dated August 30, 2007
Reply to Final Office Action of May 1, 2007

(f) because Morrison does not teach or suggest a surgical retractor according to independent claims 105 and 120, claims 105 and 120 are patentable over the Examiner's rejection, and claims 106 and 107 depending from independent claim 105 are patentable at least due to their dependency from an allowable independent claim.

(2) The Examiner's rejection of claims 125 and 126 (of which claim 125 is independent) under 35 U.S.C. § 102(b) as being unpatentable over U.S. Patent No. 5,431,658 to Moskovich ("Moskovich"), is erroneous because:

(a) Independent claim 125 recites method for performing a surgical procedure using a surgical retractor, where the surgical retractor includes "an elongate hollow member having proximal and distal end portions, the distal end portion having first and second stationary retractor arms configured for insertion at least partially into an intervertebral space defined between upper and lower opposed vertebrae";

(b) as shown in Fig. 26, for example, Applicant discloses a surgical retractor (extended outer sleeve 700) including an elongate hollow member (hollow tubular member 702) having first and second stationary retractor arms (extended portions 720 and 722);

(c) Moskovich teaches a bone graft insertion facilitator having guides 1 and 2 inserted between two vertebrae 3 and 4 that are moveable relative to one another, both in the embodiment shown in Fig. 1 and the embodiment shown in Fig. 6, to facilitate movement of the two vertebrae 3 and 4 apart from one another for accepting a bone graft 5 therebetween, where neither the embodiment shown in Fig. 1 nor the embodiment shown in Fig. 6 includes an elongate hollow member;

(d) accordingly, Moskovich does not teach or suggest a surgical retractor including an elongate hollow member having proximal and distal end portions, the distal end portion having first and second stationary retractor arms configured for insertion at least partially into an intervertebral space defined between upper and lower opposed vertebrae;

(e) because Moskovich does not teach or suggest a surgical retractor according to independent claim 125, claim 125 is patentable over the Examiner's rejection, and

Application No. 09/605,001
Pre-Appeal Brief Request For Review dated August 30, 2007
Reply to Final Office Action of May 1, 2007

claim 126 depending from claim 125, is patentable at least due to its dependency from an allowable independent claim.

III. Conclusion

In view of the foregoing remarks, it is respectfully submitted that the claims are patentable. Therefore, it is requested that the Members of the Pre-Appeal Brief Conference reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: August 30, 2007

By: 
Thomas H. Martin
Registration No. 34,383

1557 Lake O'Pines Street, NE
Hartville, Ohio 44632
Telephone: (330) 877-0700
Facsimile: (330) 877-2030